IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.1041 OF 2007.
IN
SECOND APPEAL NO.432 OF 2001.

Dattu Bandu Dabade & Ors. ...Applicants

Versus

Anandrao Digambar Suryavanshi & Ors. ...Respondents

Shri R.S.Ghadge for the Applicants.

Shri Dilip Bodake for the Respondents.

CORAM : ABHAY S.OKA, J.
DATED : 22nd November, 2007.

P.C.:

1. Heard advocates appearing for the parties. Perused the reply filed by Respondent 1(b) for himself and on behalf of other proposed legal representatives. The submission of the advocate for the proposed legal representatives is that the sole Respondent expired on 30th September, 2002 and therefore there is a delay of more than four years and there is no prayer made for setting aside abatement. He submitted that in absence of a prayer for setting aside abatement, the present application is not maintainable.

2. In the application a contention has been raised that the fact that the sole Respondent died came to the notice of the Applicants for the first time on 17th July, 2007 when a letter of the advocate for Respondent dated 09th July, 2007 was received in which it was

stated that the sole Respondent expired on 30th September, 2002. In the application it is asserted that after receiving information on 17th July, 2007 necessary information was collected from the Gram Sevak and present application has been filed on 01st August, 2007. Thus, in the application the delay has been explained.

3. It will be necessary to refer to the decision of the Apex Court in the case of **Mithailal Dalsanagar Singh & Ors Vs. Annabai Devram Kini & Ors (2003(4) Maharashtra Law Journal Page 721)**. In paragraph No.8 of the said decision, the Apex Court has observed thus:

> "8. Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. **A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside abatement"**.(Emphasis added)

4. In the present case, there is a prayer made for condonation of delay. Considering the averments made in

the application, the prayer made in this application in substance will have to be construed as a prayer made for setting aside the abatement. Accordingly, application is allowed in terms of prayer clauses (a) and (b). Amendment to be carried out within six weeks.

JUDGE